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No. 06-566

Supreme Court, U.S.
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In The

Supreme Court of the United States

EDO GEORGE MBABA AND
PATIENCE MBABA,

Petitioners,

v.

SOCIETE AIR FRANCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO NEW POINTS RAISED BY AIR FRANCE

A. Mbaba Has *No* Remedy Under the Convention for Air France's Breach of Contract

In opposing certiorari, Air France for the first time argues that Mbaba had a remedy under Article 19 of the Convention for delay damages, but that he simply "decided against pursuing" it:

> **Petitioners might have pursued recovery under Article 19 as their damages were purportedly necessary to avoid further delay by Air France's alleged substandard performance.**

Brief, p. 7 and n.8. Air France did not make this argument below, and neither the district court nor the Fifth Circuit addressed it.[1] Since Air France includes no citations to the record in its brief, it is impossible to know who Air France contends "purported" that damages were "necessary" for Mbaba to "avoid further delay." Mbaba has never made such a claim. Mbaba has never claimed to have suffered damage from any "delay."

Air France tortures logic in its attempt to cram a very large foot – Mbaba's breach-of-contract claim – into the glass slipper of Article 19. It is understandable that Air France would want to retreat from its position that the Convention leaves passengers with no remedy for any

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[1] As shown in the district court's opinion, Air France contended below that the Warsaw Convention "preempts all of Mbaba's state law claims and requires dismissal of this case in its entirety." App. 15b. If Air France had contended instead – as it now does – that Article 19 of the Convention applied, then the proper result would have been the limitation of Mbaba's recovery by Article 19, not the "dismissal of this case in its entirety."

claim except the three addressed in the Convention, but it is *this* argument that Air France urged in the courts below, it is *this* ruling that the courts below handed down, and it is *this* holding that Mbaba here challenges. Air France cannot now urge a new, Procrustean argument in opposition to certiorari simply because the decisions based on its original argument are difficult to defend.

B. There *Is* a Split of Authority Between the Fifth and Seventh Circuits on the Issue Presented

As pointed out in Mbaba's petition for certiorari, the Seventh Circuit has held that the Warsaw Convention does not preempt local law regarding claims for "nonperformance of a contract." ***Wolgel v. Mexicana Airlines***, 821 F.2d 442, 445 (7th Cir. 1987), *cert. denied*, 484 U.S. 987 (1987). By contrast, the Fifth Circuit in the case at bar held that the Convention preempted Mbaba's breach-of-contract claims. App. 9a.

Air France first denies the existence of any split in the circuits on the question presented (Brief p. 5), but then argues in the alternative that any split of authority between the Fifth and Seventh Circuits is "irrelevant." Brief, pp. 6-8. This argument depends for its validity on Air France's contention that Mbaba's claim "does not involve nonperformance of a contract." Brief, p. 7. Instead, Air France argues, Mbaba's claim is only that "Air France's contract performance fell short of what Mr. Mbaba believed was promised." *Id.* Air France classifies this as a claim only for "substandard performance," which Air France argues is distinguishable from the plaintiffs' claim in ***Wolgel***. *Id.* and n.8.

Air France cites no authority for its innovative distinction of "nonperformance" from "substandard performance." Mbaba is aware of none. Breach of contract is generally understood as:

> **Failure, without legal excuse, to perform any promise which forms the whole or part of a contract.**

See, e.g., Black's Law Dictionary, West Publishing Co., 5th ed., 1979. Here, Air France failed to perform its promise to transport Mbaba's excess bags to Lagos for $520.00. This is hornbook breach of contract. Even if Air France's demand for an additional $4,048.66 could be *semantically* distinguished as "substandard performance," there is no *legally* cognizable distinction between "substandard performance" and "nonperformance." Both are asserted as breach-of-contract claims at common law.

Air France's denial of a split of authority between the Fifth and Seventh Circuits exposes a second flaw in its logic. Since Air France contends that the Fifth Circuit was correct, then to deny a split between the Fifth and Seventh Circuits necessarily implies that the Seventh Circuit in ***Wolgel*** was also correct – that the Convention does *not* preempt local law in claims for "total nonperformance" of contract. Brief, p. 7. The flaw in this logic is that Air France's major premise – as well as that of both courts below – is that a plaintiff is precluded from recovering for any claim arising in the course of international air travel merely by virtue of the Convention's silence as to such a claim. Brief, p. 5; App. 1a; App. 23b. However, the Convention is silent as to both "nonperformance" and "substandard performance" of contract. The logic is inescapable that if one is precluded by the Convention's silence, the other must be, also.

Thus, accepting Air France's major premise compels the conclusion that ***Wolgel*** was error even if Air France's distinction of "nonperformance" from "substandard performance" is accepted as valid. If the ***Wolgel*** decision was error, then there is a split of authority between the Fifth and Seventh Circuits that this Court should now grant certiorari to resolve.

C. The Convention's "Cardinal Purpose" of Uniformity Does Not Justify the Holdings of the Courts Below

As Air France points out several times, "The cardinal purpose of the Warsaw Convention ... is to achieve uniformity of rules governing claims arising from international air transportation." ***El Al Israel Airlines, Ltd. v. Tseng***, 525 U.S. 155, 169 (1999). Air France issues a dire warning of the dangers of "subjecting international air carriers to as many interpretations of their [contracts] as there are destinations in their travel offerings." Brief, p. 8. Air France characterizes the interest of uniformity as "elephantine" (Brief, p. 12) and argues that if uniformity is required in personal injury cases,

> **... then *a fortiori* uniformity in disputes over terms in uniform contracts of international air carriage requires application of the Convention to those cases because of the greater interest in uniformity in the latter.**

Brief, p. 15. This conclusion is a *non sequitur*, and is supported neither by logic nor by the Convention itself.

First, the Convention achieves uniformity in personal injury cases by specifically addressing and uniformitizing the remedies for such injuries suffered in the course of

international air carriage in Article 17. The Convention does not address remedies for an airline's breach of contract. It does not follow that by omitting to mention them at all, the Convention achieves uniformity in contract disputes by extinction of the entire species.

Second, other provisions of the Convention fail to lend credence to the argument that uniformity is such an overarching concern as to render all other considerations unimportant. In fact, other articles specifically invoke local law in several important and substantive areas. Article 22(1) provides that damages may be awarded "in the form of periodical payments," but only if permitted by "the law of the Court seised of the case." Article 25(1) defers to "the law of the Court seised of the case" for the important determination of whether an airline's conduct is of such a character as to be deemed "wilful (sic) misconduct." Article 28(2) provides that questions of procedure are governed by local law. Article 29(2) makes the same provision with respect to calculating the period of limitations.

Airlines are, by design, already subject to local law in many significant respects. The fact that the Convention specifically leaves to local law to decide so many important matters militates against the obsessive judicial allegiance to uniformity urged by Air France as the foundation for its argument.

D. Mbaba Was Not "In the Course of Embarkation" For International Travel When His Claim Arose

Arguing that Mbaba's claims are preempted merely because he was "in the course of international air carriage," (Brief, p. 5), Air France contends there is "no dispute" that Mbaba's damages arose in "the international

transportation of persons, baggage, or goods by aircraft." Brief p. 15. Air France conflates the prefatory statement of the Convention's subject matter in Article 1(1) with the Convention's preemptive scope set forth in Article 24.[2]

There *is* a dispute as to whether Mbaba was "in the course of embarkation"[3] when his claims arose – at least as that term has been defined by the Second and Third Circuits. This Court has not adopted a test for when a passenger is "in the course of any of the operations of embarking." However, the Second Circuit considers four factors: (i) the activity of the passengers at the time; (ii) the restrictions, if any, on their movements; (iii) the imminence of actual boarding; and (iv) the physical proximity of the passengers to the gate. ***King v. American Airlines***, 284 F.3d 352, 359 (2d Cir. 2002); ***Buonocore v. Trans World Airlines, Inc.***, 900 F.2d 8, 10 (2d Cir. 1990).

Applying this test, no court has ever held that a passenger similarly situated to Mbaba – one who had not

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[2] Looking to Article 1 for the Convention's preemptive scope disregards both the express language of Article 24 and this Court's prior observations that it is Article 24 that "prescribes the exclusivity of the Convention's provisions for air carrier liability," not Article 1(1). *See, e.g.*, *Tseng*, 525 U.S. at 167.

[3] Air France accuses Mbaba of failing to show how Mbaba's claims "fall outside of the course of embarkation." Brief, p. 14. Article 17 of the Convention makes air carriers liable for "death or wounding" of the passenger if the accident that cause the bodily injury took place "on board the aircraft or in the course of any of the operations of embarking or disembarking." Air France has never contended that Article 17 applied to Mbaba's claims in the case at bar, but here seems to suggest that the Article 17 language – and by derivation, the Convention's preemptive scope – be extended to breach-of-contract claims by any person who is "on board the aircraft or in the course of any of the operations of embarking or disembarking" when the airline breaches his contract.

surrendered his ticket and was merely presenting bags for check-in in the main terminal – was "in the course of embarkation." *See, e.g.*, ***Evangelinos v. Trans World Airlines, Inc.***, 550 F.2d 152, 156 (3d Cir. 1977) (en banc) (plaintiffs were in the course of embarkation because they had completed all prerequisites to boarding except for the final security search at the gate, were congregated at the gate at the direction of airline personnel, and were awaiting the bus to take them to the plane); ***Day v. Trans World Airlines, Inc.***, 528 F.2d 31, 33-34 (2d Cir. 1975) (passengers were in the course of embarkation when they had surrendered tickets, gone through passport control, entered an area exclusively for departing passengers, and assembled at the gate in readiness for departure).

Mbaba was not on board an aircraft when the events giving rise to this suit took place – he was in a public area where his movements were unrestricted. He had not cleared security, he was not in close proximity to the gate, and boarding was not imminent. At the time Air France demanded that Mbaba pay an additional $4,048.66 if he wanted his four bags to join him on the second leg of his journey, Mbaba was indistinguishable in any legal respect from a mere passerby in the terminal who had not yet purchased a ticket. Thus, even if the Convention preempts breach-of-contract claims arising "in the course of embarkation," it would not preempt Mbaba's contract claim in the case at bar.

E. The Merits of Mbaba's Breach-of-Contract Claim Are Not Relevant to Whether the Convention Permits Him to Assert It

Citing no support in the record and including no appendix to its brief, Air France argues the merits of Mbaba's breach-of-contract claim with a canard:[4]

> **In this case, however, the uniform contract of carriage expressly states that carriage of baggage is subject to various terms including application of tariffs, taxes, and related amounts upon check-in of baggage. Petitioners complain because Air France applied those charges when Mr. Mbaba checked in his excess baggage [in Paris].**

Brief, p. 7; *see also* p. 14.

It may well be that a trier of fact in the case at bar will ultimately decide that Air France did not breach its contract with Mbaba. However, the court below did not reach the merits of Mbaba's claim, and they are not at issue here. App. 9a. The merits of a claim that has yet to be tried are not pertinent to whether this Court should decide if Mbaba has a right to assert the claim at all.

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[4] Mbaba does *not* complain about Air France's application of tariffs and taxes. There has never been any evidence that the simple application of "tariffs and taxes" accounted for Air France's $4,048.66 overcharge to Mbaba.

CONCLUSION

Mbaba has no remedy under Article 19 of the Convention. Air France's argument that there is no split between the Fifth and Seventh Circuits on the issue of the Convention's preemption of contract claims is based on a distinction between nonperformance and "substandard performance" that is not recognized in the law. Even if the Convention preempts claims arising "onboard the aircraft or in the operations of embarkation or disembarkation," Mbaba's contract claims would not be preempted.

PRAYER

For these reasons, Petitioners pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

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